

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Two Recent Cases Show False Claims Actions Based on Stark and Anti-Kickback Laws Are Alive And Well

November 21, 2006

Two recent False Claims Act (FCA)¹ cases underscore the fact that the government is continuing to use the FCA as a tool for enforcement against alleged violations of the Stark and Anti-Kickback laws. Because the penalties in FCA cases include treble damages for each false claim submitted, and because the FCA allows private citizen “relators” to bring qui tam actions under the FCA and to share in any eventual recovery, the magnitude and frequency of FCA cases have increased over the years.

United States v. Rogan

On September 29, 2006, the United States District Court, Northern District of Illinois, issued a verdict of approximately \$64 million in a FCA lawsuit against Peter Rogan, the former owner and CEO of Edgewater Medical Center (Edgewater), a Chicago teaching hospital. The verdict was based on a finding that Rogan caused Edgewater to submit false claims to Medicare and Medicaid for services to patients referred by physicians with whom Edgewater had prohibited financial relationships that violated the Stark and Anti-Kickback laws. *United States v. Rogan*, No. 02-C3310, 2006 WL 2860972 (N.D. Ill. Sept. 29, 2006). The court found that from 1995 to 2000 Rogan had conspired with certain physicians to engage in a scheme designed to benefit Edgewater through increased referrals. The physicians’ improper financial interests were created through a variety of contracts, such as medical director agreements, physician recruiting contracts, teaching contracts, EKG-reading contracts, and physician loan agreements, which provided the doctors with compensation that the court found was “grossly” above fair market value for services never substantially performed.

The court awarded the government \$64 million in damages and penalties. To determine this amount, the court trebled the total value of all claims submitted to Medicare or Medicaid for patients referred to Edgewater by two co-conspiring physicians during the period from 1995 to

¹ [Federal Civil False Claims Act, 31 U.S.C. §§ 3729-3733 (2006)].

2000. In addition, Rogan was subject to a \$7,500 civil penalty for each of those claims, which is reflected in the aggregate judgment amount.

United States ex rel. Burnes v. Northside Hospital

On October 20, 2006, the Department of Justice announced a settlement agreement with Northside Hospital (Northside), an Atlanta community hospital, and two physician-owned entities – Blood and Marrow Transplant Group of Georgia (BMTGA) and Atlanta Blood Services (ABS) – to resolve alleged FCA and Stark violations. *United States ex rel. Burnes v. Northside Hosp.* (N.D. Ga. filed Oct. 20, 2006).

Two former employees of BMTGA initiated the action on February 20, 2004, by filing a complaint in accordance with the qui tam provisions of the FCA. These relators split \$1.2 million of the settlement proceeds as their share of the recovery and, in addition, received funds to cover their attorneys' fees and expenses.

The complaint alleged that from July 1997 through June 2006, improper financial arrangements existed between Northside and physicians with ownership interests in BMTGA and ABS. The alleged improper financial relationships included (a) medical director agreements that exceeded fair market value, (b) management and product agreements used by Northside to purchase platelet transfusion products from ABS at prices above fair market value, and (c) arrangements whereby Northside provided its employees' services free of charge to interested physicians for the benefit of their private practices.

The settlement agreement requires Northside to pay \$5,728,440 to the United States, while BMTGA and ABC must pay \$650,000. In addition, Northside has agreed to pay an additional \$403,000 in attorneys' fees and expenses to the relators. BMTGA has agreed to pay an additional \$142,000 to one relator to settle any other potential civil claims. Northside, BMTGA and ABS each expressly deny any liability, fault or wrongdoing in the settlement agreement.

As part of the settlement, Northside, BMTGA and ABS agreed to enter into compliance agreements with the OIG which require the three entities to abide by certain policies and procedures designed to ensure compliance with the statutes and regulations that govern the use of federal health care funds.

Conclusion

The Rogan and Northside cases illustrate that Stark and Anti-Kickback enforcement through FCA actions is alive and well. In fact, enforcement on both the federal and state level may increase as states recognize the incentives created by the Deficit Reduction Act of 2005 to enact state false claims acts. Moreover, even where the government chooses not to intervene in false claim qui tam actions, individual plaintiffs may pursue these claims on behalf of the government given in order to waive themselves of the potential for large relator recoveries.

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